71

(3)

No. 07-362

FILED
OCT 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

TEEN RANCH, INC., MATTHEW KOCH and MITCHELL KOSTER,

Petitioners,

v.

MARIANNE UDOW, MUSETTE MICHAEL and DEBORA BUCHANAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

BENJAMIN W. BULL
GARY MCCALEB
JORDAN LORENCE
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, Arizona 85260
(480) 444-0020

KEVIN THERIOT
Counsel of Record
JOEL OSTER
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
(913) 685-8000

MARK P. BUCCHI
550 Stephenson, Suite 202
Troy, Michigan 48083
(248) 589-8800

Attorneys for the Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. FIA'S MISSTATEMENT OF THE CASE	3
II. THIS CASE PRESENTS AN IMPORTANT FEDERAL ISSUE	6
III. THE DECISION BELOW CONFLCITS WITH SUPREME COURT PRECEDENT	8
A. *Locke*	8
B. *Mitchell* and *Zelman*	9
IV. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS	12
A. *Freedom from Religion v. McCallum*	12
B. *American Jewish Congress ("AJC")*	12
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES:

American Jewish Congress v. Corporation for National and Community Service, 399 F.3d 351 (D.C. Cir. 2005) 12, 13

Freedom from Religion Foundation. Inc. v. McCallum, 324 F.3d 880 (7th Cir. 2003) 2, 12, 13

Locke v. Davey, 540 U.S. 712 (2003) 2, 8, 9, 13

Mitchell v. Helms, 530 U.S. 793 (2000) 5, 9

Teen Ranch v. Udow, 389 F. Supp. 2d 827 (W.D. Mich. 2005) 8

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) ..... *passim*

STATUTES:

28 U.S.C. § 1343(a)(3) 1

42 U.S.C. § 604a ..... *passim*

42 U.S.C. § 604a(d) 2

42 U.S.C. § 1983 6

Michigan Public Act, section 220 ..... 2, 4, 7, 8, 9

INTRODUCTION

Teen Ranch's basic premise throughout this litigation is that the constitution prohibits state officials from exercising their own philosophical preferences in requiring faith-based organizations ("FBOs") to change their religious character before they can participate in the state's residential care program.[1] FIA's arguments to the contrary are based on four faulty premises. In addition, in claiming that the Establishment Clause requires them to discriminate against Teen Ranch, FIA factually relies entirely on its own volitional and arbitrary behavior.

First, FIA wrongly assumes that federal jurisdiction over Teen Ranch's constitutional claims is determined by 42 U.S.C. § 604a ("Federal Law"). Federal jurisdiction is granted by 28 U.S.C. § 1343(a)(3). The Federal Law is relevant, however, as it wholly contradicts FIA's "philosophical preferences." FIA's actions run exactly contrary to this statute and the Michigan statute that incorporates it (2003 PA 172, "Public Act"). The Federal Law and the Public Act do not support FIA's philosophical preference that FBOs not be permitted to express religious beliefs in treatment programs. To the contrary, they expressly *grant* FBOs the right to *define, practice* and *express* their

[1] Contrary to FIA's assertion, Teen Ranch never argued that FIA must force wards to go to Teen Ranch. It was Teen Ranch, not FIA, that asserted the wards' statutory and constitutional right to be free of coercion in the placement process.

beliefs in their services. *See* 42 U.S.C. § 604a(d) and Public Act § 220(4).

Second, FIA wrongly argues that *Locke v. Davey,* 540 U.S. 712 (2003), gave them, as state employees, unbridled discretion to discriminate against FBOs in all areas of government funding, based solely on their "philosophical preferences." *Locke* says just the opposite.

> the only interest at issue here is the State's interest in not funding the religious training of clergy. Nothing in our opinion suggests that the State may justify any interest that its "philosophical preference commands."

Id. at 722 n.5.

Third, FIA and the Sixth Circuit wrongly asserted a false distinction between the right to reject unwanted religious placements and "true" private choice. They claim that the private choice doctrine requires that the individual choose from some sort of *menu*. This conflicts with *Freedom from Religion v. McCallum,* 324 F.3d 880 (7th Cir. 2003), which confirmed that the *right to reject* placement in a religious half-way house proposed by a parole officer is true private choice. As FIA admits, the Seventh Circuit equated this right of refusal to the school vouchers found in *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002). *See* FIA Brief at 32.

Fourth, FIA claims that youth are incapable of private choice. FIA wrongly assumes that adult proxies (including a guardian ad litem ("GAL"), case

worker, and parent), who are legally obligated to act in the best interest of the youth, cannot assist them in exercising private choice. This is inconsistent with *Zelman,* where this Court approved the selection of parochial grade schools on behalf of children by their parents and guardians.

Finally, FIA claims that the Establishment Clause requires them to discriminate against Teen Ranch because it incorporates religion into its treatment programs. FIA bases this assertion on its conclusion that funding of Teen Ranch would be "direct." This conclusion rests entirely on FIA's arbitrary *insistence* on its current placement process, an insistence that is both arbitrary and volitional, as we will demonstrate in Parts I and III.A. below. A state agency cannot avoid state, federal, and constitutional mandates of nondiscrimination by arbitrarily structuring their programs in a way that fabricates Establishment Clause concerns.

We now address FIA's arguments as they appeared in their brief.

I. FIA'S MISSTATEMENT OF THE CASE

FIA's Statement begins by objectively misstating Teen Ranch's position. Teen Ranch *has never alleged* that FIA must affirmatively force unwilling wards to go to Teen Ranch. Teen Ranch's Policy and Procedure Directive ("Policy"), cited in FIA's Brief, *declines to accept* involuntary placements to Teen Ranch's program. *See* FIA Brief, 10b-16b. Yet, FIA has refused

even to place a youth who *with full knowledge* of Teen Ranch's religious character, *requested* to be placed at Teen Ranch.

Teen Ranch agrees that the state should not *directly* fund religious activities. The funding here, however, is *indirect.* Like all 96 private facilities in Michigan, Teen Ranch was paid on a per diem, per capita basis, not with a grant, and was paid only for services delivered to identifiable individuals. The two governing statutes guarantee that no one may be forced to go to or stay at a religious facility against their will.

Next, FIA essentially admits that its discrimination against Teen Ranch was *entirely based on its voluntary and arbitrary insistence on a placement protocol that has no statutory sanction. See* FIA Brief at 7-8. FIA's "process" is to require the ward to go to their computer's "first choice." But, FIA admits that their mode of placement is not required by any statute or regulation. Neither do they contend or show that there ever was a substantial difference between the facility their system chooses and the next preferred placement, such that a ward who rejects the proposed placement would suffer any measurable diminution in quality or effectiveness of care at odds with the statutes.[2] FIA admits that their computer

[2] Under the two statutes, unless the replacement facility is not "substantially the same as" the first choice, the objecting individual must be allowed to choose the replacement. 42 U.S.C. § 604a(e)(1); Public Act § 220(2).

cannot differentiate the facilities in terms of effectiveness. They never claim that, if their agents (caseworkers and lawyer-GALs) did assist the wards in exercising the statutory rights, the wards' conscientious choices would *not* be effectuated. They even implemented the process we say the statutes require for a brief time, and have reported no unsatisfactory results. Hence, their insistence on their preferred system of placement is patently volitional and arbitrary.

FIA repeats their assertion that Teen Ranch is a "pervasively" religious program. FIA Brief at 9-12. However, in *Mitchell v. Helms*, 530 U.S. 793 (2000), a plurality of this Court excoriated the practice of discriminating against "pervasively" religious institutions as "a doctrine born of bigotry, that should be buried now." *Id.* at 829. In *Zelman*, the Court did not analyze how religious the parochial schools were before it upheld the constitutionality of a voucher program. *See* 536 U.S. at 655-56. Once a private choice system is established, it cannot be said that the *government* is impermissibly channeling youth to a religious organization. This is all the more true here, because FIA admits "religion is not a factor in the placement process." FIA Brief at 8.

Hence, FIA's Statement essentially concedes the factual groundwork upon which to conclude that their actions have been volitional, arbitrary, discriminatory, and contrary to their statutory and constitutional obligations.

II. THIS CASE PRESENTS AN IMPORTANT FEDERAL ISSUE.

This case presents a significant federal issue – whether a state agency can defeat state, federal, and constitutional mandates of nondiscrimination by structuring a program in a way that fabricates Establishment Clause concerns. FIA, acting on its own philosophical preferences, determined that Teen Ranch must forfeit its religious beliefs and practices if it wants to participate in the state's residential care program. Yet, FIA's actions run contrary to federal and state law on this very issue. FIA cannot creatively implement its program in such a way as to avoid nondiscrimination protections in federal and state law.

FIA argues that federal courts lack jurisdiction to enforce violations of 42 U.S.C. § 604a. This is a strawman argument. Teen Ranch's constitutional claims are brought pursuant to 42 U.S.C. § 1983, not § 604a. Teen Ranch claims that FIA violated its constitutional rights when, acting on their own philosophical preferences, they required Teen Ranch to surrender its religious practices before it could participate in the state's residential care program. Both the Federal Law and the Public Act are relevant, though, because they form the statutory framework that is binding on FIA. Since FIA's actions are contrary of these statutes, it becomes all the clearer that they are acting purely upon personal philosophical preferences.

FIA argues that the Federal Law is not applicable to their care of troubled youths, and does not require them to allow FBOs who express their religious beliefs in treatment programs to participate. FIA Brief at 16-19. But the Michigan Legislature has adopted the Federal Law guidelines for *all* purposes "related to faith based involvement," including residential youth care. *See* Public Act § 220(4). Therefore, the Federal Law has been made directly applicable by the Michigan Legislature.

FIA also tries to distinguish between "religious character" and inclusion of religious content in programming. The stated purpose of the Federal Law, however, is to permit religious facilities to contract with the state "*without impairing* the religious character of such organizations," and it *defines* "religious character" to *include* the practice and expression of religious belief. *See* 42 U.S.C. § 604a(b) & (d)(1); and Teen Ranch Petition at 6 ("TR Pet") (full analysis). Hence, FIA's claim that the Federal Law protects only the private unexpressed religious beliefs of an FBO's staff is directly refuted by the text of the law itself. These provisions fall within the blanket incorporation provision of the Public Act. Hence, contrary to FIA's assertion, the right of FBOs to *do and say* religious things is protected by *both* statutes.

Admittedly, the funding in question must be the result of genuine private choice. But both statutes *mandate* private choice. Recipients of state-funded services have the right to reject placements to which they object, assuring them an acceptable placement.

See 42 U.S.C. § 604a(e)(1) and Public Act §§ 220(2) & (4). Hence, in no way does Teen Ranch seek "direct" funding of its programs. This renders the HHS directives cited by FIA irrelevant. To the extent that the status quo resembles "direct" funding, it is because, in derogation of these statutory directives, FIA arbitrarily insists on their first choice when placing wards. Were FIA to allow wards what the statutes clearly prescribe, their genuine private choice would become obvious.

FIA's claim regarding whether Teen Ranch has pled a "state law claim" is inapposite. Teen Ranch is not pursuing a state law claim. As the District Court noted, the statutory non-compliance Teen Ranch pled is merely illustrative of FIA's constitutional violations. *See Teen Ranch v. Udow*, 479 F. Supp. 2d 827, 832 (W.D. Mich. 2005).

III. THE DECISION BELOW CONFLICTS WITH SUPREME COURT PRECEDENT.

A. *Locke*

The lynchpin issue is whether *Locke* permits state officials to discriminate against FBOs on the basis of the officials' personal philosophical preferences. This Court meticulously disclaimed any such broad discretion even to state *legislatures*, much less unelected state employees. *See* 540 U.S. at 722 n.5 ("Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands"). FIA neither cites nor addresses this

express limitation. Rather, FIA simply asserts that they have the presumptive right to discriminate against FBOs based on religion. FIA Brief at 25-26.

In *Locke,* this Court carefully limited its holding to the narrow field of state funding for "the religious training of clergy." *Id.* at 722 n.5. Here, not only is the relevant activity not "the religious training of clergy," but FIA's *preferences* are *admittedly* opposed to the express purpose of the Federal Law, which Michigan adopted. *See* Public Act, § 220(4).[3] Hence, to extend *Locke* to protect FIA's actions, the Sixth Circuit completely disregarded the express limits announced by this Court.

B. *Mitchell* and *Zelman*

FIA unsuccessfully attempts to harmonize the Sixth Circuit's opinion with *Mitchell* and *Zelman.*

FIA distorts *Mitchell.* FIA Brief at 27-28. With due respect, this Court didn't merely "attempt" to "move away from" the formalism of "who writes the check to whom." It did so. The key holding of *Mitchell* is that such formalisms are not of constitutional significance. *See* 530 U.S. at 793. No one denies this holding. Hence, FIA's arguments that *Mitchell* does not support Teen Ranch in other respects are similarly futile and irrelevant.

---

[3] *See* TR Pet. at 20 for Defendant Buchanan's admission of this personal preference.

Justice O'Connor's opinion regarding "diverting funds" is inapplicable in the private choice context. The essential effect of private choice is to render irrelevant whether, and how much of, the activity in which a willing individual participates is religious, because the *state is not* the "endorsing" actor. It is inconsistent to suggest that, even in such settings, there remain limits on how the funding may be used.[4] *See Zelman*, 536 U.S. at 662 (holding that government vouchers did not violate the Establishment Clause even though some vouchers were used by students to attend religious schools).

The "jurisdiction" of the FIA over the youth is likewise immaterial. All school age children in this country are subject to truancy laws and, in that sense, "under the jurisdiction" of their state's Department of Education. This fact clearly does *not* render them incapable of private choice.

FIA's treatment of *Zelman* is even less persuasive. In *Zelman,* this Court acknowledged the ability of responsible adults to exercise private choice for minors. As such, "youth" is not a special class, incapable of private choice. *See* 536 U.S. at 653. Nowhere does FIA confront or rebut this aspect of *Zelman. See* FIA Brief at 28-31. Yet, because adults *can* exercise

---

[4] This theory would produce the unseemly and facially unconstitutional result of tasking government employees, even federal judges, to monitor private choice programs and prevent "too much praying" from happening.

private choice for children in their care, like the parents in Cleveland, the FIA "youth" argument is meritless.

The distinctions suggested by FIA not only miss this point altogether, they also reveal the weak underpinnings of their case. The alleged lack of private choice FIA cites rests entirely on its refusal to grant wards the right to conscience-based refusal of placement required by law. If these wards are, in any sense, denied "choice" in this case, it is neither Teen Ranch, the relevant statutes, nor the mere fact that the wards are under FIA's "jurisdiction" that denies it. It is only because FIA arbitrarily insists on making placements without giving heed to the wards' religious preferences and objections, and what both state and federal law require of them.

On page 30, FIA invokes the school prayer cases, improperly equating the right to "opt-out" of certain prayers and religious observances addressed in those cases with the private choice right to avoid *being* at the religious facility *at all*. Our Petition amply demonstrates the irrelevance of the school prayer cases. TR Pet. at 30. Nowhere does FIA explain why these cases are relevant in the case of private choice placements. They cannot. The palpable constitutional difference between being allowed to sit out a prayer at a school one *must attend*, versus being *allowed* to refuse placement at a religious institution in the first place, is manifest. One cannot suffer "subtle coercion" in a facility in which one has chosen *not to be*.

IV. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS.

A. *Freedom from Religion v. McCallum*

In *McCallum,* the Seventh Circuit held that a parolee's right to reject his parole officer's suggestion and require placement at a secular halfway house *is* private choice on par with the *Zelman* vouchers. FIA *admits* this. FIA Brief at 32 & n.54. FIA and the Sixth Circuit simply disagree with *McCallum*, claiming that, *because the wards are minors*, private choice cannot be found unless some sort of "menu" is proffered (which, perversely, FIA refuses to proffer). *Id.* FIA cites no authority that has held that a "menu" *is* essential to *anyone's* private choice. As noted above, *Zelman* debunks the "youth" distinction. FIA and the Sixth Circuit simply conflict with *McCallum.*

B. *American Jewish Congress ("AJC")*

Teen Ranch cites *AJC* for its holding that private choice exists when the government cannot "impermissibly channel" an individual into accepting an unwanted religious placement. *See AJC,* 399 F.3d 351, 358 (D.C. Cir. 2005). While discussing other aspects of *AJC*, FIA does not deny this holding. It offers no alternative argument as to what the essence of private choice is. Instead, FIA attempts again to distinguish *Zelman. See* FIA Brief at 28-29. In the process, FIA makes this telling admission. "In *Zelman, parents were able to make independent choices*

about the school their child would attend." FIA Brief, 33 (emphasis added). Thus, FIA *admits* the essential point concerning *Zelman*, i.e., adult proxies *can* exercise private choice on behalf of children as young as first graders. This debunks the theory that private choice is somehow beyond the reach of teenagers like the wards in question. Be they hardened youth offenders, or, as FIA would have it, "emotionally fragile or damaged children," is immaterial. The wards are *all* equipped with capable adult proxies and spokesmen to effectuate the choices guaranteed by both the Federal Law and the Public Act.

In *AJC*, the court taught that the absence of "impermissible channeling" defines private choice. Here, such channeling is statutorily prohibited. FIA admits that indeed, religion plays no part in the placement process. FIA Brief at 8.

Viewed in light of the pivotal fact that FIA's actions herein have been both volitional and arbitrary, the following conclusions obtain: (a) the relevant statutes require FIA to allow Teen Ranch its religious character and forbid discrimination against it; (b) the relevant statutes require FIA to honor the wards' private choice rights; (c) FIA simply disagrees with these requirements, and refuses to implement them; (d) *Locke* does *not* authorize FIA to disregard these mandates and indulge their admitted personal "philosophical preferences;" (e) *McCallum* renders the absence of a "menu" irrelevant; (f) *Zelman* debunks the "youth" argument; and (g) *AJC* focuses the debate on the issue that the two statutes expressly

settle – impermissible channeling to religious facilities. FIA's and the Sixth Circuit's analysis cannot be harmonized with the above. They serve to subvert two decades of private choice jurisprudence and conflict with other circuits.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

BENJAMIN W. BULL
GARY MCCALEB
JORDAN LORENCE
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste. 165
Scottsdale, Arizona 85260
(480) 444-0020

MARK P. BUCCHI
550 Stephenson, Suite 202
Troy, Michigan 48083
(248) 589-8800

KEVIN THERIOT
Counsel of Record
JOEL OSTER
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
(913) 685-8000